Court Ordered “Independent Medical Exams” And The Standard Of Review - A Second Kick At The Can

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When a court orders a Plaintiff to attend an independent medical exam (click here to read some related posts on this topic) in an ICBC or other Injury Claim and the parties appeal what is the standard of review used in the appellate hearing?

Reasons for judgement were released today by the BC Supreme Court, New Westminster Registry, addressing this issue.

In today’s case (Barbosa v. Castillo) the Plaintiff attended an Independent Medical Exam (IME) with an Orthopaedic Surgeon chosen by the Defendant. He gave an opinion that the plaintiff did not have a “*functional problem*” with respect to any neurological complaints. The Plaintiff then served expert reports outlining that he had nerve root irritation which negatively impacted his ability to work.

The Defence asked for a second medical exam, this time with a neurologist. On application to Court the presiding Master rejected the motion. The Defendant appealed the ruling. On hearing the appeal Mr. Justice Schultes had to decide, amongst other things, what the legal test was on these types of applications. He ruled that the appeal can be a rehearing (as opposed to requiring proof that the Master was ‘clearly wrong’) in essence giving the appellant a second kick at the can. Specifically the Court held as follows:

[14] Before proceeding further, it is necessary to establish the applicable standard of review of the learned master’s decision. It is well established that on purely interlocutory matters, it must be demonstrated that the master was “clearly wrong” in his or her decision. However, when the ruling raises questions that are vital to the final issue in the case, the reviewing court approaches the matter as a rehearing. When the master’s decision deals with a question of law, the standard of review is correctness: Abermin Corp. v. Granges Exploration Ltd., [1990] B.C.J. No. 1060 (S.C.), and Joubarne v. Sandes, 2009 BCSC 1413 at para. 14.

[15] A decision to deny a defendant the opportunity to have an independent medical examination conducted of the plaintiff can raise questions that are vital to the final issue in the case. In Belke v. Bennett, 2006 BCSC 536, Mr. Justice Barrow provided the following helpful approach at para. 5:

If the Master's order amounts to a refusal, whether in whole or in part, of an application to have the plaintiff submit to an independent medical examination, it may deprive the defendant of discovering evidence necessary for a full examination of the plaintiff's claim or of a defence advanced. It is in that sense that a decision may be said to go to an issue vital to the trial. […] If, on the other hand, the Master's order simply sets terms on which the independent medical examination is to be conducted or directs that such an examination not be performed by a particular professional, the defendant is not deprived of potential evidence, and the order cannot be characterized as going to an issue that may be vital to a final issue at the trial.

[16] I adopt this analysis. I think the master's decision in this case fell within the first situation envisioned in Belke. Denying the defendant's application effectively foreclosed any exploration of Dr. Hunt's opinion, let alone any rebuttal of it, on behalf of the defendant by an expert with the specific expertise necessary to cope with the report on its own terms.

[17] If uncontradicted, Dr. Hunt's opinion could be determinative of several of the kinds of damages claimed by the plaintiff, in particular as to the true nature and extent of his injuries and their impact on his future earning capacity. These questions appear to be vital to several final issues. Accordingly, I will treat this appeal as a rehearing.

Mr. Justice Schultes went onto allow the appeal and order the second defence medical exam. In doing so the Court provided the following useful summary of the law discussing factors courts can consider in applications for multiple independent defence medical exams:

[19] Turning to the actual merits of the defendant's application on the rehearing, an excellent summary of the applicable law in this area was provided by Madam Justice D. Smith, then a member of this court, in McKay v. Passmore, 2005 BCSC 570 at paras. 15 - 19:

15. The principles to be followed in deciding whether the defendants have shown an adequate basis for a second IME are set out in Trahan v. West Coast Amusements Ltd.[2000] BCSC 691 (CanLII), [2000] BCSC 691, at para. 48:

The authorities establish that additional medical examinations are in the discretion of the court … (citations omitted).

That discretion is to be exercised judicially, considering the evidence adduced. A second examination to permit the defendant a second opinion on the same subject matter will not be allowed. A second examination may be appropriate where there is some question which could not have been dealt with on the first examination … (Citations omitted).

That the magnitude of the loss is greater than previously known is not in and of itself sufficient to permit a second examination … (Citations omitted).

Where diagnosis is difficult and existing assessments are aged, further assessment may be required …

And in Roberge v. Canada Life Assurance Co. [2002] BCSC 1500 (CanLII), [2002] BCSC 1500 at paragraph 9:

The distinction is quite important. Simply put, when a person in litigation makes a claim for a personal injury, the defendant is, without oversimplifying the matter, almost always entitled to a medical examination of the plaintiff. A much higher standard is imposed when the defendant seeks a second medical examination of the plaintiff.

16. The overriding question is whether a second medical examination is necessary to ensure reasonable equality between the parties in their preparation of a case for trial: Wildemann v. Webster [1990] CanLII 206 (BC C.A.), [1991] 50 B.C.L.R. (2d) 244 (C.A.).

17. Reasonable equality does not mean that the defendant must be able to match expert for expert or report for report. I refer to Trahan v. West Coast Amusement Ltd. and toMacNevin v. Vroom [21 December 2004] New Westminster S072995 (S.C.).

18. The defendants must satisfy the court that there is some question or matter that could not have been dealt with at the first examination: Jackson v. Miller [1999] B.C.J. No. 2751 (S.C.).

19. In considering how to exercise the discretion to grant a second IME, the court should take into account the timeliness of the application in the light of Rule 40A and the practicalities of trial preparation... [citations omitted.]